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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 399

LYKES-YOUNGSTOWN CORPORATION and
LYKES BROS. STEAMSHIP CO., INC.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

REPLY TO BRIEF IN OPPOSITION

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Respondent's brief in opposition to the petition, as with defendant's briefs below, is largely unresponsive to the points presented by petitioner.

I

The first point of the petition is that the decision below interpreting a standard-form contract clause one way for certain contractors and another way for others raises significant issues respecting the uniform interpretation of Government

contracts which should be reviewed by this Court. Respondent does not answer this point, except to make the unsupported assertion that the lower court's interpretation of the contract language "was conducive to uniformity" (Br. 11), an assertion illogical on its face.

Respondent's first point (Br. 9-11) is essentially a defense of one of the two conflicting contract interpretations of the court below. Its argument is that the court correctly upheld the Board's interpretation against the owner in this case because a 1960 letter received by a trade association three years prior to the contracts in suit stated a policy that the Board would not pay subsidy for changes exceeding 2% of the contract price, that that policy was reaffirmed by the Board in 1962, and, respondent further implies, that in acting upon petitioner's request in 1965 the Board invoked that policy as a reason for its action (Br. 10).

The circumstances surrounding the 1960 letter are outlined at pages 11-12 of the petition and cast grave doubt upon its applicability to the present contracts in any event. Moreover, it is highly questionable whether the "2% policy" expressed therein would ever have put anyone on notice that the Board might act upon a change request in the manner it did here. The letter stated that aside from exceptional cases (see Brief in Opposition, p. 16):

> [i]n shipbuilding contracts involving the payment of Government subsidy, there will be an overall limitation of 2% of the single vessel contract price in connection with the authorization of changes under contract and approved cost settlements.

This statement might have put one on notice that the Board claimed the right to find a requested change ineligible for subsidy where the aggregate cost of changes previously found eligible for subsidy amounted to 2% of the contract price. It did not even remotely suggest, however, that the Board might also, after finding a requested change eligible for subsidy, pay its share of subsidy on the basis of a dif-

ferent, hypothetical change.[1] Nor did it suggest that subsidy might be limited, as it was here, for reasons having nothing whatever to do with whether or not the cost was within 2% of the contract price.

Contrary to respondent's statement, the Board did not in 1962 or any other time of which petitioner is aware reaffirm a policy limiting subsidy for changes to those within 2% of the contract price, and the court below did not so hold. Administrator's Order No. 55, 27 Fed. Reg. 10335, quoted in material part at note 8, page 10 of respondent's brief, was merely a *redelegation of authority* from the Board to a staff member which permitted the staff member to approve contract changes under $50,000 so long as their aggregate cost did not exceed 2% of the contract price. Authority to approve all other changes remained in the Board. Approval of all changes under the contracts was required whether or not subsidy for their cost was requested (Ex. 8, p. 4), and the redelegation of a portion of this authority made no reference to subsidy or eligibility for subsidy. Administrator's Order No. 55 was an internal, administrative order stating who had authority to approve changes; it did not purport to set forth any criteria by which changes should or would be approved or found eligible for subsidy.

Respondent's further suggestion that the Board relied upon a policy of limiting subsidizable changes at 2% of the contract price in its action as to petitioner is not only incorrect, so far as the record shows, but is also contrary to defendant's flat statement below that "[d]efendant does not contend that the Board posited its action . . . upon" that

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[1] The implication created by respondent's brief (p. 5), that the bow thrusters change and the hypothetical "four mooring winches" change were somehow related, is incorrect. Bow thrusters perform different functions from mooring winches. See Exs. 71 and 72.

The only relationship between the bow thrusters change and the earlier proposed mooring winches change referred to by respondent is that the Board determined to pay subsidy for the former upon the basis of the cost of the latter.

policy. See defendant's brief below filed July 24, 1969, pp. 9-10. In its letter of transmittal to petitioner in 1965, the Board referred to Administrator's Order No. 55 only to make clear that the cost of the bow thrusters change was not to be included in determining when the staff member had reached the limit of his redelegated authority in approving changes. See Brief in Opposition, p. 10, note 9.[2] Respondent's imprecision contributes only confusion.

Respondent claims (Br. 12) that the Government's failure to pay the contract-specified rate of subsidy for the full cost of a change found to be eligible for subsidy does not frustrate the purpose of Title V of the Merchant Marine Act because the Act provides for subsidy for "only the original cost of having a vessel constructed in a domestic shipyard" and not for the cost of changes in the original contract work. No statutory language is referred to and none supports this statement. Title V by its terms is designed to provide a subsidy "to aid in the construction of . . . new vessel[s]"[3] and its legislative history makes clear that it was intended to provide a subsidy representing "the difference between the American and foreign *cost* of building" such vessels.[4] The cost of construction of something so complex as a vessel, as the Board has long recognized, invariably involves changes in the contract work, particularly where, as here, new technological developments appear during the construction process.[5] Petitioner does not under-

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[2] The various memoranda and minutes referred to in note 9, at p. 10 of respondent's brief, similarly refer to the redelegation of authority to approve changes, not to any limitation upon their eligibility for subsidy.

[3] Section 501(a), 46 U.S.C. §1151(a).

[4] S. Rep. No. 1721, 74th Cong., 2d Sess. (1936) 14 (emphasis supplied).

[5] More than thirty years ago it was recognized that the "changes" clause was "a standard form used by the Government in all construction contracts." General Contracting and Construction Co. v. United States, 84 Ct. Cl. 570, 579 (1937).

stand respondent to be suggesting that the Board's long-standing practice of paying subsidy for changes found eligible therefor has not been authorized by the statute, yet that is the import of its unfounded statement that the statute provides subsidy only for the "original cost." The objective of the Act is no less frustrated by forcing an owner to pay more than his share of the cost of an eligible change than by forcing him to pay a disproportionate share of the "original" contract price. In either case the owner is forced partially to subsidize the domestic shipbuilding industry, which is a perversion of the Congressional intention.

II

Petitioner argued below that the Board's action was without rational basis, that it violated the Board's own stated policies and that it unjustly discriminated against petitioner and in favor of others similarly situated. Petitioner contends here that the court below failed to consider and resolve the issues thus raised, presenting for this Court a significant issue respecting the proper function of a reviewing court in matters involving exercise of discretion by contracting agencies.

Respondent states generally that the "Board's actions were fully considered by the court below" (Br. 13), but does not attempt to show where in the court's decision petitioner's arguments or the reasoning of the Board were considered. Nor does respondent answer petitioner's contentions as to the significance of the issue for consideration by this Court.

Respondent refers to the lower court's statement that "the action of the Board was not arbitrary nor an abuse of discretion, but was a valid exercise of the authority conferred upon it by the contracts" (Br. 13). This conclusory statement by the court does not evidence consideration of the specific issues raised by petitioner, and to accept it as such would be to license avoidance of judicial responsibility. In view of the court's earlier statement that the reasons for the Board's action were "not material" and of the court's failure to discuss or consider those reasons, it cannot be pre-

sumed that the lower court in fact considered the reasons for the Board's action or petitioner's contentions respecting those reasons.

Respondent does not dispute the proposition that, as the court below has elsewhere held, "[a] party vested with contractual discretion must exercise that discretion reasonably and may not do so arbitrarily or capriciously."[6] It was impossible for the lower court to determine in this case that the Board's exercise of discretion was not arbitrary without finding the reasons upon which the Board's action was based (see Pet. 15-16),[7] just as it is impossible for this Court to determine that the lower court's action was valid absent evidence of consideration of all issues presented to that court and a statement of its reasons for its actions upon those issues.

III

At pages 17-20 of the petition there is demonstrated the existence of genuine issues of fact respecting both petitioner's and the Board's understanding of the pertinent contract language at the time the contracts were executed. Respondent (Br. 13-14) contends that the principal issue below was that of "the legal effect of the Board's 1960 letter with respect to the contract terms." It is clear from the lower court's opinion itself, however, that its conclusion as to the legal effect of the 1960 letter rested upon the court's findings as to both the meaning that the Board intended to convey (see Pet. 13A) and petitioner's "knowledge" of that meaning when it executed the contracts (Pet. 15A), both of which are in dispute.

[6]Pacific Far East Line, Inc. v. United States, 184 Ct. Cl. 169, 184 (1968).

[7]While the court below found that the "Board did not give any reason for its action nor state on what basis it was limiting its subsidy participation in its decision of May 18, 1965" (see Pet. 15A), respondent says that "[t]he reasons for this decision were fully indicated in the letter [of May 18, 1965] transmitting the decision to petitioner" (Br. 6).

Finally the fact that petitioner had moved for summary judgment upon its legal theory of the case was not an indication that petitioner believed there were no factual issues presented upon the Government's theory.

Respectfully submitted,

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